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STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

*****

SCOT S. DE YOUNG,

Plaintiff/Counter-Defendant,

v

TOWN & COUNTRY ELECTRIC, INC., a Michigan corporation, **KENNETH G. BING,** and **PATTI L. BING**, husband and wife,

Defendants/Counter-Plaintiffs.
______________________________________/

OPINION AND ORDER FOLLOWING TRIAL
Case No. 14-03816-CB
Hon. Jon A. Van Allsburg

Bradley J. Fisher (P64608)
Attorney for Plaintiff /Counter-Defendant

Ronald J. VanderVeen (P33067)
Attorney for Defendants/Counter-Plaintiffs

At a session of said Court, held in the Ottawa County Courthouse in the City of Grand Haven, Michigan, on the 25th day of April, 2016

This action was filed by the plaintiff, Scot DeYoung ("DeYoung"), against his former employer, Town & Country Electric, Inc. ("T&C"), and T&C's majority shareholder and his wife, Kenneth Bing ("Bing") and Patti Bing, following DeYoung's January 2014 termination as general manager of T&C. DeYoung alleges that he was fired following his refusal to sell back to the company the stock which he had purchased through a stock purchase plan. He seeks damages for oppression of his rights as a minority shareholder, and an order requiring the repurchase of his stock at a fair price.

Plaintiff began employment with a competitor, Windemuller, Inc., in the spring of 2014 following the termination of his employment. The defendants counter-claimed, alleging breach of a 2005 employment agreement by which plaintiff agreed not to compete against the defendant corporation for a period of 24 months following the termination of his employment. The defendants requested and were granted a preliminary injunction on December 30, 2014, upholding the two-year term of the noncompetition agreement, but limiting its scope. Defendants seek a permanent injunction, with an extended term and broadened scope.

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The preliminary injunction was amended and corrected by Order Granting Motion for Reconsideration entered April 15, 2015. Plaintiff's complaint initially sought enforcement of a contract to purchase plaintiff's stock. The court ruled that defendant had an option to purchase, but no contractual obligation to do so, and granted summary disposition dismissing plaintiff's breach of contract claim (Count 1). The court also granted summary disposition dismissing plaintiff's accounting claim and exemplary damages claim. Plaintiff's pre-trial motion in limine to exclude evidence as to a third-party loan guaranteed by plaintiff and defendant Bing was also granted.

A bench trial was conducted on plaintiff's minority shareholder oppression claim, and defendant's claim for a permanent injunction. Although count two of plaintiff's complaint had been partially dismissed on summary disposition, summary disposition was denied as to the allegations that T&C refused to pay dividends, and that T&C depleted corporate funds that would otherwise have been available to pay dividends by quadrupling capital expenditures. The court also reserved for trial plaintiff's claim that the termination of his employment constituted an element of his shareholder oppression claim. Trial was held on November 18, 19, and 20, 2015, at which the court heard testimony from the plaintiff, defendant Bing, and six other witnesses, and received 38 exhibits into evidence. Written closing arguments were requested by the parties, and were submitted by December 18, 2015.

I. The Facts: Trial Testimony and Evidence

DeYoung has an electrical engineering degree from Calvin College in Grand Rapids, Michigan. He was hired by T&C in May 1992 as an electrical apprentice. Over the next ten years DeYoung became an electrician, then a project manager. In 2002 he was appointed the General Manager of the company, and thereafter did little site work on company projects, but instead handled back office and management issues. Bing remained involved full-time in sales work for the company. By the time DeYoung left the company, it had grown to 47 employees (varying between 43 and 54 employees).

T&C is an electrical contractor performing 80% of its business in Ottawa County, 18% in Kent County, and 2% elsewhere. It provides electrical contracting services to residential, industrial/light commercial, and medical customers, and includes many schools and churches among its customers. The company installs electrical panels and wiring, although 20% of its business is in the field of industrial controls, which are computing devices that control machines and industrial processes.

The company was incorporated by defendant Kenneth G. Bing on July 22, 1987 (per Articles of Incorporation admitted as Defendant's Exhibit H). Mr. Bing was the sole incorporator, and adopted the company's Bylaws (Defendant's Exhibit I). The Bylaws provided

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for an annual meeting to be held the second Monday in March in each year, at which shareholders would elect "a Board of Directors" and transact "such other business as may properly come before the meeting." (Art. II, Sec. 1). Art. III, Sec. 1 of the Bylaws provides that the corporation's business "shall be managed by its Board of Directors, whose members shall number two (2)." The transfer of corporate shares is governed by such rules and regulations as the Board of Directors shall determine (Art. VI, Sec. 2), and the declaration of dividends is left to the discretion of the Board of Directors (Art. VIII, Sec. 3). Nothing in the Articles of Incorporation or the Bylaws of the corporation requires the payment of dividends.

The Stock Purchase Agreement

DeYoung testified that in 2005 Bing approached him and a few other key employees about buying stock in the company. Bing offered these employees the option to participate in a stock purchase agreement. On December 6, 2005, T&C entered into two separate agreements with the plaintiff: an employment agreement (EA) (defendant's Exhibit E) and a stock purchase agreement (SPA) (plaintiff's Exhibit 1). The intent of the SPA was that plaintiff and other participating employees would, over a ten-year period, purchase up to 40% of the outstanding stock in the company, and that a final buy-out of the plaintiff's remaining 60% ownership interest would then occur on terms to be determined, ultimately leaving plaintiff as the owner of 60% of the outstanding stock.

The 2005 SPA contained projections as to future stock purchases as shown in Schedule D to plaintiff's Exhibit 1. These projections appeared to show that DeYoung and the other potential shareholders would receive increased bonuses and stock dividends based upon their participation in the SPA. The participants would still have to make net out-of-pocket payments for their stock during the first six years of the plan, but the projections showed that bonuses and stock dividends were intended to cover the cost of stock purchases thereafter.

DeYoung testified that the actual stock prices rose much faster than the original projections. This was partially due to the fact that the company's performance was better than projected, but was also due to the fact that Bing increased the "multiplier" used to determine the annual stock price from 5 to 7 in 2006 and 2007 (before reducing it back to 5 in 2008).[1]

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[1] Plaintiff's Exhibit 4 showed the stock prices set in the years during which the SPA was in effect:

2005	$226.36 per share (DeYoung bought 548 shares).
2006	$403.70 per share (DeYoung bought 250 shares).
2007	$463.25 per share (DeYoung bought 250 shares).
2008	$385.28 per share (DeYoung bought 250 shares).
2009	$377.04 per share (DeYoung bought 250 shares).
2010	$326.51 per share (DeYoung bought 0 shares).
2011	$273.47 per share (DeYoung bought 150 shares).
2012 (per Exhibit 5)	$284.23 per share (DeYoung bought 0 shares).

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The employees participating in the stock purchase plan signed a five-year note for each of the years in which stock was purchased, thereby financing their purchases. After a few years of this, the accumulated payments on the successive annual notes began to exceed their respective ability to pay them. Richard James Klaasen is a project manager for T&C, and has been with the company for 22 years. He purchased 160 shares of the company's stock (about 1.5% of the company), and testified that he was the first of the minority shareholders to stop participating in the stock purchase plan, as he couldn't afford it.

DeYoung already owned 22 shares prior to signing the SPA. He purchased shares in each of the years 2005 – 2009 and 2011, but did not buy stock in 2010 or 2012, as he couldn't afford the cumulative debt payments. His cumulative stock ownership is now 1,720 shares. At some point in late 2012 or early 2013, DeYoung testified that he and the other minority shareholders asked Bing to consider selling his majority interest in the company early, but Bing wasn't ready to do that. DeYoung said that it was then mutually agreed to put the SPA "on ice." Bing then presented proposed minutes of their annual shareholders meeting dated March 12, 2013 (plaintiff's Exhibit 5) which stated that the SPA was dissolved by mutual agreement,[2] and all of the shareholders agreed and signed the minutes. Nothing in the SPA obligated the company or its Board of Directors to pay dividends on corporate stock,[3] and none of the agreements contained in the SPA survived its dissolution in March 2013.

By January 2014, plaintiff owned, and continues to own, 17% of the outstanding stock. The EA contained noncompetition and nonsolicitation terms. As recently as 2013, the parties anticipated that plaintiff would eventually become the president of the company. Unfortunately, the SPA foundered and was dissolved after about eight years, and the relationship between plaintiff and defendant Bing faltered before the parties ever reached agreement on the ultimate buyout of Bing's remaining shares. Plaintiff's employment was terminated on January 6, 2014.

DeYoung's Performance Reviews and Declining Relationship with Bing

In February 2011, DeYoung sat down with Bing for an annual performance review, at which Bing rated DeYoung on several factors in the categories of "Personal Performance," Professional Attributes," and "Supervisory Performance," with most factors considered "acceptable" (two factors were determined "outstanding," and three were "unacceptable"). Among DeYoung's accomplishments, Bing noted that DeYoung had obtained a Master Electrical license in the state of Nebraska to better service a major customer, had worked hard to

[2] As permitted in Section 9(c) of the Stock Purchase Agreement.

[3] Although Schedule D to Exhibit 1 contained projections (provided to the plaintiff and other employees in 2005) which indicated that income paid to them annually through a "bonus pool" and stock dividends would help to pay their annual stock purchase payments.

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advance the company, and had represented the company well in the community.

In the same evaluation, Bing noted DeYoung had "great difficulty controlling language and following company policy regarding same." He noted with respect to planning, "day to day bogging things down." Bing summarized DeYoung's development needs as "a plan to allocate more time managing," "proper delegation," and "improved communicating and reporting skills." Finally, he noted, "Anger management is a serious concern, as I have personally experienced blow-ups." DeYoung's 2011 goals were 1) Develop a written 3-year business plan, 2) Increase sales and profit margins by 20% over 2010, and 3) Adhere to Company Policy regarding profanity both personally and within the company with others."

In March 2012, plaintiff again participated in an annual performance review with Bing. Accomplishments listed included improved gross sales and margin over 2010 by 1.8% in a "tough economy," representing T&C professionally at community functions, remaining decisive and frugal regarding large equipment purchases, and maintaining overall positive subordinate morale. However, the relationship between DeYoung and Bing continued to deteriorate. Bing wrote:

> "Not working cooperatively with owner in a collaborative and constructive way. Overly critical of owner and others as well as treats me with diminishing respect. I feel like Scot's not being totally truthful with feelings, and/or motives behind his comments. Very demeaning to me. Not anything like the respect and dignity shown in the past. Very hurtful remarks and I couldn't sleep for several days following last managers meeting. What have I done to deserve such disrespect and contempt? Its as if you want me to blow up at you?"

The 2013 performance review, held in March 2013, appeared to show some significant improvement in DeYoung's evaluation, with most factors being rated outstanding. Bing noted continued stress from DeYoung's language but depersonalized it, stating, "Cursing and speaking out in anger is a boob's tactic and usually results in superfluous stress and frustration toward and with others." However, there was no direct criticism of contemptuous or demeaning words or conduct, and Bing suggested in identifying DeYoung's developmental needs only that he should work on "Continued and improved balance of listening skills and action steps in support of subordinates." DeYoung's goals for 2013 were "Accepting new role or position as President of Town & Country Group for 2014 and beyond."

Over the course of 2013, plaintiff and defendant Bing had occasional discussions about the potential transition of plaintiff into the role of president, but nothing of substance was accomplished toward that goal. After the performance review in March, DeYoung said that the other shareholders were told of that plan, and he and Bing actually talked about switching offices. DeYoung testified that they had intermittent lunches together where the subject came

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up, and although Bing began using the "CEO" title later that year, nothing firm was decided.

Finally in October 2013, the night prior to a managers' meeting, DeYoung asked Bing if he had drafted a transition plan, and Bing said, "No, why don't you try it." DeYoung wrote a memo regarding "2013 Management Change" (plaintiff's Exhibit 3), and presented it to Bing the next day. He envisioned a "clean break" in management responsibilities, to minimize confusion among employees, and proposed that Bing would not be in regular weekly contact with the office. He presented the memo to Bing over lunch, but got no immediate response. In fact, Bing never responded to it at all. DeYoung said he never intended to push Bing "out the door," and saw no sign that Bing was offended by the proposal. It is now apparent that he was offended.

Randy Westrate, another minority shareholder, also testified that DeYoung's relationship with Bing was not fully reconciled at the end of 2013. Randy has been with the company for 32 years, and was also a participant in the stock purchase plan. He recalled that he had been part of a meeting late in 2013 at which DeYoung had gotten angry at Bing and yelled at him. Westrate testified that DeYoung treated Bing so poorly in that meeting that Randy and his wife visited the Bings at home that night to express their sympathy.

Bing's Offer to Repurchase Shares

On December 16, 2013, Bing scheduled separate meetings with DeYoung and each of the other shareholders, at the office of the company's accountant, and made separate offers to buy back each shareholder's stock ownership in T&C. The memo given to each of the shareholders presented the offer as a response to the request to terminate the SPA, and "undo" the stock purchases. In the memo given to DeYoung, Bing calculated the total bonuses and dividends paid to DeYoung during the term of the SPA, subtracted the stock payments and taxes paid by DeYoung during the same period (on his bonuses and dividends), and then made an offer intended to cover the shortfall (described as plaintiff's "out of pocket investment") in order "to be made whole." The offer appeared to be structured as a proposal to the shareholders to "break even" on their stock purchases. DeYoung calculated the value of the offer at $56.71 per share.

Plaintiff had received annual discretionary bonuses as an employee of the company, both before and after the 2005 SPA. He received discretionary bonuses of $20,000 in 2006, $10,000 in 2009, $20,000 in 2010, and $20,000 in 2012. Corporate bonuses had also been paid annually (except in 2009 and 2010) to plaintiff in amounts ranging from $2,229 to $6,024. In addition to his regular salary and the above bonuses, plaintiff had also received SPA "Plan" bonuses and shareholder dividends. Following his 2014 termination, he received only dividends. This compensation is shown as follows:

Year	Plan Bonuses	Dividends	Totals:
2005	$39,094.00	$362.69	$39,456.69

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2006	$30,988.22	$64,529.92	$95,518.14
2007	$59,942.90	$62,734.33	$122,677.23
2008	$55,470.90	$57,634.96	$113,105.86
2009	$54,574.00	$52,884.84	$107,458.84
2010	$22,388.00	$18,537.92	$40,925.92
2011	$20,524.00	$30,677.79	$51,201.79
2012	$53,345.84	$36,162.09	$89,507.93
2013	-	$83,212.95	$83,212.95
2014	-	-	-
2015	-	$10,309.69	$10,309.69
Totals:	$336,327.86	$417,047.18	$753,375.04

By the end of 2013, plaintiff had made payments for his stock ownership, pursuant to the SPA, totaling $658,650.79. He had also paid income taxes on the plan bonuses and dividends paid by him (by defendant's calculation, as shown in Exhibit 4) totaling $243,919.61.

DeYoung testified that no one had asked Bing to buy back any shares of stock, and after talking to some other minority shareholders, DeYoung and the other shareholders decided to counter Bing's offer at the current share price (as set at the March 2013 shareholders meeting). On December 23, 2013, DeYoung emailed Bing with a copy to the other minority shareholders (plaintiff's Exhibit 6), and as to Bing's offer, said, "We do not feel it is acceptable compensation for these shares." DeYoung proposed using the current share price, and noted the hard work of the shareholders over the years the SPA was in place, and said "It does not feel fair to the shareholders to try and 'turn back the clock' and act like all the extra work and effort for those years did not occur." DeYoung proposed, "Shall we have a meeting together to discuss this?" He proposed meeting during the week of January 2 or the following week, as he knew Bing was gone during the holidays.

DeYoung's Termination

DeYoung testified that he and Bing were both in the office on Thursday, January 2, and Friday, January 3, 2014, but that he and Bing did not meet until Tuesday, January 7, 2014. At that meeting, Bing presented DeYoung with a typewritten "Notice of Employment Termination" (plaintiff's Exhibit 7), and escorted DeYoung out of the office. Bing collected DeYoung's office and company car keys, and drive him home. DeYoung was stunned, and said Bing "wasn't very chatty." DeYoung believes his termination was a direct consequence of his counter-offer for the sale of the company stock.

Bing's termination notice, however, described "Recent years of growing conflict, struggle, harsh and demeaning communications," and DeYoung's "associated acts of personal insubordination," had caused Bing to conclude that they had "irreconcilable differences in management and leadership attributes." DeYoung was terminated immediately due to the "consistent tension, conflict, and continuing differences," and was given two weeks' severance pay, in addition to any wages and accrued vacation pay.

Richard Klaasen sent an email to DeYoung on January 9, 2014 (plaintiff's Exhibit 14), expressing shock at DeYoung's termination, saying, "I still can't believe he fired you…." and asking, "Did you get a chance to give him a counter offer on your stock 'buy back'?" Randy Westrate also sent an email to DeYoung on January 9, 2014 (plaintiff's Exhibit 15), stating, "We were all shocked to hear this on Tuesday and we are still trying to sort it all out." Westrate also testified he had to borrow money to make prior stock purchases, and he ultimately accepted Bing's offer to repurchase his shares. He netted about $15,000 after paying off his five-year notes. He said DeYoung called him an idiot (or something like it) for accepting Bing's repurchase offer.

Post-Termination Corporate Action

DeYoung testified that the per-share value of T&C stock was set at $284.23 at the March 12, 2013 shareholders meeting, based upon the company's 2012 performance. He testified that the company's fortunes improved significantly between 2013 and 2014, and cited the following metrics:

2014 Cash on hand increased to	$796,256 (a 48% increase over 2013)
2014 total assets increased to	$850,785 (a 48% increase over 2013)
2014 working capital increased to	$67,234 (a 49% increase over 2013)
2014 Form 1120S taxable income increased to	$120,805 (a 42% increase over 2013)

DeYoung said that in spite of the company's improved performance, no dividends at all were paid in 2014. Instead, the company reported the following increased expenses:

2014 capital expenditures increased by	$320,010 (a 130% increase over 2013)
2014 compensation to Mr. Bing increased	$71,514 (a 22% increase over 2013)
2014 bonuses increased by	$65,450 (a 26% increase over 2013)

DeYoung disputed the claim that the increased capital expenditures were due to expenditures being deferred during the recession. He stated that by 2014, there were no longer any equipment expenditures being deferred. He testified that 2009 and 2010 were the difficult years of the recession, and that economically, the company's performance had "smoothed out" in 2011. He also disputed the reasonableness of the company's explanation that some of Bing's 2015 income was "pre-paid" in 2014.

DeYoung received 2013 dividends, prior to his termination, totaling $83,213. The company paid total dividends of $491,744 that year. In 2014, following his termination, no dividends were paid, in spite of the company's improved performance. He testified that he had to pay income taxes on his share of the company's passed-through profits in 2014, despite receiving no dividends. He acknowledged his understanding that dividends would have to be paid pro rata to all shareholders, and that no shareholders received any dividends in 2014. DeYoung received a single dividend of a little over $10,000 in the first quarter of 2015.

DeYoung testified that the 2013 annual meeting of shareholders was documented in minutes dated March 12, 2013, although no one attended a physical meeting. The shareholders simply signed the pre-drafted minutes (Plaintiff's Exhibit 5), approving the election of Mr. and Mrs. Bing, Mr. DeYoung, and Jack Overway to the board of directors, approved minutes and financial reports, ratified prior sales of stock and the dissolution of the 2005 stock purchase plan, and determined the value of the company stock to be $284.23 per share.

Following his January 2014 termination, DeYoung attended the 2014 and 2015 annual shareholders and directors meetings – the first such meetings at which there was actual attendance (DeYoung said prior annual meetings were simply documented by signed minutes, rather than by actual attendance). At the 2014 annual meeting, held March 11, 2014, the minutes (Defendant's Exhibit K) were again signed by all shareholders, and reflect that all shareholders were present. Mr. and Mrs. Bing and Mr. Overway were re-elected to the board of directors, but Mr. DeYoung was not elected (by a vote of 5-1). Prior minutes and financial reports were approved, and the shareholders again approved the transfer of shares by Mr. and Mrs. Bing pursuant to "the plan" (no plan was referenced, and the 2005 plan had been dissolved a year prior to the meeting). At the 2014 meeting, the shareholders approved the valuation of the company stock at $260.96 per share.

At the 2015 annual meeting, held March 10, 2015, the minutes (Plaintiff's Exhibit 11) were again signed by all shareholders, and reflect that all shareholders were present (the number of shareholders had decreased by one due to the re-purchase of Westrate's stock by Bing in 2014). The corporation's bylaws were amended to provide for three directors rather than two as had been provided in the Bylaws, and Mr. and Mrs. Bing and Mr. Overway were re-elected to the board of directors. The minutes reflect a unanimous vote, but DeYoung testified that he had abstained. Prior minutes and financial reports were approved. In response to an inquiry whether any shareholder disapproved of any specific act, the minutes reflect that DeYoung objected to the manner in which billings in excess of costs, and estimated earnings on uncompleted contracts, were accounted for. However, the minutes reflect that the shareholders unanimously approved the previous acts of the corporation's officers and directors. Finally, the shareholders approved the re-valuation of the company stock at $288.40 per share.

II. The Law

A. Minority Shareholder Oppression

The remaining claim in plaintiff's first amended complaint alleges minority shareholder oppression pursuant to MCL 450.1489. MCL 450.1489 states:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
> (a) The dissolution and liquidation of the assets and business of the corporation.
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.
>
> (2) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.
>
> (3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

The Court of Appeals has confirmed that § 489 of the Michigan Business Corporation Act creates a cause of action for shareholder oppression. *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 278-279; 649 NW2d 84 (2002) (*Estes II*). In *Franchino v Franchino*, 263 Mich App 172, 173-174; 687 NW2d 620 (2004), the Court of Appeals held that § 489 creates a cause of action for an individual only as a shareholder, not as a member of a board of directors or as an employee of a corporation. A single, significant act of oppressive conduct may be a sufficient basis for an action under § 489. For example, the redemption of a shareholder's stock in a closely held corporation for a price not offered to a minority shareholder may constitute shareholder oppression. *Schimke* v *Liquid Dustlayer, Inc*, unpublished opinion per curiam of the Court of Appeals (Docket No. 282421, September 24, 2009), slip op at 5.[4]

In *Berger v Katz*, unpublished per curiam opinion of the Court of Appeals (Docket No. 291663, 293880, July 28, 2011), the Court of Appeals upheld a trial court's finding that the majority shareholders had engaged in willfully unfair and oppressive conduct toward the minority shareholder. The plaintiff in that case had voluntarily left the day-to-day operations of the company and moved out-of-state. Shortly after that, the majority shareholders stopped paying distributions to him. They also substantially increased their own salaries and incurred increased company expenses at a time when they were telling the minority shareholder the corporation was no longer profitable. The majority shareholders also refused to allow plaintiff to participate in corporate decisions. Finally, the majority shareholders issued a capital call when the corporation was doing fairly well, in order to dilute plaintiff's shares and force him to put his own money into the corporation.

The Court of Appeals in *Berger* noted that majority shareholders in a corporation owe "the utmost in good faith in its control and management as to the minority and it is the essence of this trust that it must be so managed so as to produce to each shareholder, the best possible return upon his investment," citing *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978), quoting 6 Callaghan's Michigan Civil Jurisprudence (2d ed), § 166, p. 365. The Court further noted that "where the evidence shows that majority shareholders improperly diverted corporate funds, a breach of fiduciary duty can be found," citing *Salvador*, 87 Mich App at 675-677.

[4] An unpublished opinion of the Court of Appeals is not binding precedent under the doctrine of *stare decisis*. MCR 7.215(C)(1). Effective May 1, 2016, the court rule will specifically discourage the citation of unpublished opinions. The unpublished opinions cited here contain unique factual elements which assist the court in analyzing the scope and application of the law. There is no statute, case, or court rule that forbids the circuit court to adopt the reasoning found in an unpublished opinion if this court finds the reasoning therein to be persuasive. See *Steele* v *Dep't of Corrections*, 215 Mich App 710, 714 n2; 546 NW2d 725 (1996), *lv den* 454 Mich 853 (1997).

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In *Fox v Idea Sphere, Inc.*, 2013 WL 1191743 (No. 12 Civ. 1342(CM), U.S. D.Ct., S.D.N.Y., 2013),[5] a federal district court in New York dismissed a minority oppression claim under § 489 based upon the termination of the minority shareholder as an officer and director of the corporation as the termination did not interfere with his rights as a shareholder. However, the adoption of a "debt-for-equity-swap," which arguably diluted the plaintiff's stock interest in the corporation, may have been undertaken to single out the plaintiff, and dismissal of that § 489 claim was denied. Relying upon *Berger*, above, the *Fox* court also denied dismissal of a claim based upon the alleged failure to notify or permit the minority shareholder to participate in a capital call. Finally, the court refused to dismiss a § 489 claim based upon the failure to provide plaintiff with corporate documents to which he was allegedly entitled as a shareholder.

In *Daniel English Trust v Equity Logistics, Inc.*, unpublished per curiam opinion of the Court of Appeals (Docket No. 314057, March 27, 2014), the Court of Appeals upheld summary disposition in favor of plaintiff, finding a violation of § 489 based upon unlawful diversion of corporate profits to other entities and failure to distribute financial reports. The details of the alleged oppressive conduct are not provided in the opinion, and the court's holding is actually based upon the scope of the damage award determined by case evaluation. The case is therefore not extremely useful for comparison with the present case with respect to the alleged oppressive conduct. As in *Berger*, however, the improper or unlawful diversion of corporate funds was specifically noted.

When assessing claims of minority shareholder oppression, the focus is on the majority's conduct, not on the minority's expectations. *Franchino*, 263 Mich App at 188. The majority's conduct need not be illegal or fraudulent to be willfully unfair and oppressive under § 450.1489. *See Moore v Carney*, 84 Mich App 399, 401; 269 NW2d 614 (1978) (under prior law, the trial court's findings, based upon "acts (or omissions) of mismanagement," were determined to be sufficient). The court has limited plaintiff's factual allegations of shareholder oppression to the following: (1) T&C's refusal to pay dividends; (2) T&C's alleged depletion of corporate funds that would otherwise have been available to pay dividends by quadrupling capital expenditures; and (3) T&C's termination of the plaintiff for refusing defendants' offer to repurchase his shares.

Analysis

With respect to plaintiff's assertion that T&C refused to pay dividends, it is not disputed that, prior to DeYoung's termination, T&C made annual distributions of dividends and bonuses to DeYoung and other minority shareholders in amounts which paid for a significant part of their stock purchases, as well as income tax obligations. The payment of dividends continued for three quarters following the termination of the SPA in March 2013. It is also undisputed that no

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[5] Although the decisions of lower federal courts are not binding precedent, federal decisions interpreting state law may be persuasive. *Omian v Chrysler Group LLC*, 309 Mich App 297; 869 NW2d 625, 630-631 n6 (2015)

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dividends were paid to shareholders in 2014 following DeYoung's termination, and none since then with the exception of a relatively small dividend paid in March 2015.

Because T&C is a subchapter S corporation under the tax code, each shareholder must declare his or her share of the corporation's taxable income on his or her personal return as shown on an annual Schedule K-1 form received by each shareholder. The company's history of regular and significant dividends enabled each shareholder to pay those tax obligations, as well as to pay for stock purchases under the SPA. The company continued the payment of significant dividends through 2013 even after dissolution of the SPA in March 2013. It is apparent that it was the termination of plaintiff's employment, not the dissolution of the SPA, which caused dividends to cease. This was confirmed by Bing, who testified that DeYoung was paid no dividends in 2014 because he was no longer an employee. However, dividends are paid to shareholders, not to employees, and Bing's statement is an indicator of his motivation. It is apparent that defendant terminated plaintiff, at least in significant part, because plaintiff rejected defendant's offer to repurchase his T&C stock.

The court concludes that T&C's failure to pay dividends constitutes "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the [plaintiff] as a shareholder." MCL 450.1489(3). Defendants argue that the company's decision not to pay dividends is based upon "conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure." *Id.* However, defendants did not identify the source of that decision. Neither the articles of incorporation nor the bylaws provide any policy or procedure regarding the payment of dividends, and the only agreement which might have applied to this issue was the SPA which had been dissolved. No other written policy or procedure pertaining to the payment of dividends has been identified.

Plaintiff's testimony, and the chronology of events, present circumstantial evidence that that defendants' action in failing to pay "meaningful dividends" was motivated by defendant's desire to deny such dividends to the plaintiff, and thereby substantially interfere with his interests as a shareholder, and that defendants' alleged business purposes are simply pretexts for that wrongful action. Defendant Bing's trial testimony lends support to this conclusion. It appears that DeYoung's rejection of Bing's below-fair-market stock purchase offer was the catalyst for his termination, and the post-termination denial of dividends was intended to serve as either retribution for that refusal, and/or as financial pressure to motivate a below-market sale of plaintiff's stock.

The court notes that plaintiff has not alleged an unlawful diversion of corporate funds as in the case law cited above, and argues that the business justifications cited by plaintiff for not paying dividends were simply a pretext for its actual purpose of interfering with plaintiff's

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interests as a shareholder. Defendant impliedly asserts that its decision to increase capital expenditures, to increase Bing's compensation, and to increase employee bonuses rather than to pay dividends is based upon "conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure." *Id.* Defendants have not identified a consistently applied written corporate policy or procedure beyond the generic authority of a corporation to determine compensation and pay bonuses, make capital expenditures, and declare dividends.

The court concludes that the testimony and evidence presented in the present case, in which all of the "non-dividend methods" of disbursing corporation income were used, combined with the intention to deny dividends to the plaintiff, constitute sufficient and persuasive evidence of "a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder," and entitles plaintiff to relief for minority shareholder oppression.

The trial court is given a great deal of discretion and flexibility to fashion a remedy for a violation of MCL 450.1489, up to and including a dissolution and liquidation of the corporation. *Moore*, 84 Mich App at 404 (applying the former statute). The harsh remedy of dissolution is inappropriate here. Plaintiff seeks the forced repurchase of his 17% stock ownership interest. The statute grants the court authority to direct or prohibit specific action by the corporation's shareholders, directors, officers, or others who are parties to the action. MCL 450.1489(1)(d).

The court notes that the only buyout provisions to which the company and its shareholders had agreed were contained in the SPA, and that these agreements were terminated by mutual agreement in 2013. A forced repurchase of the plaintiff's stock would have a substantial financial impact on the corporation, and potentially affects not only the parties to this action, but the fifty employees of the defendant corporation. Given the flexibility granted to the court, a more nuanced remedy is required.

First, the corporation is ordered to pay annual dividends to the plaintiff (and therefore to all shareholders). The corporation shall distribute not less than twenty-five percent (25%) of its annual pre-tax net income in the form of cash dividends to shareholders for so long as plaintiff is a shareholder in the corporation, commencing with calendar year 2014,[6] and continuing thereafter. As this litigation has made clear, it is possible for a corporation's directors to exert control over the calculation of "pre-tax net income" by allocating corporate expenditures to a wide array of allegedly justifiable business expenditures. Corporate directors are ordinarily entitled to a broad exercise of "business judgment" in such matters – except when under court order following a determination of minority shareholder oppression. The court will therefore

[6] The calculation of the 2014 and 2015 dividends shall be based upon the corporation's actual taxable net income for such years (subject to the "reasonableness review" described in this Opinion), and shall be paid in 2016 (i.e., the court does not expect any amendment of 2014 or 2015 tax returns).

retain jurisdiction to enforce this judgment, and may disallow unreasonably excessive increases in capital expenditures, salaries, bonuses, and other unusual business expenses, for purposes of calculating "pre-tax net income." This is not to say that normal salary increases and employee bonuses, or other reasonable business expenses will be disallowed by the court for purposes of determining "pre-tax net income," only that unusual or excessive increases in such expenses may be disallowed.

The point of this requirement is to place the parties on a more level playing field. It is not equitable to leave a former employee who holds a stock ownership interest and who has an annual obligation to pay taxes on his pro rata share of the former employer's taxable income without any means of paying that income, particularly when the stock was purchased with the representation that dividends would be issued to pay that financial obligation. Leaving the former employee in that position would create a financial burden on the shareholder, making the shareholder more likely to agree to a less-than-fair-market price for his or her shares.

At the same time, requiring too high a percentage of the company's taxable income to be distributed in the form of dividends, or taking too aggressive a stance on what constitutes a "reasonable business expense" for purposes of calculating "pre-tax net income," would place the former employer under financial hardship, not to mention uncertainty, and could result in a financial windfall to the former employee. Setting the minimum required distribution of dividends at 25% of reasonable "pre-tax net income" is intended to relieve the financial pressure on the former employee by providing him with sufficient dividend income to pay his "flow-through" tax obligation. Neither party is likely to be comfortable with this arrangement over the long term because it leaves them as co-owners of the corporation, and likely requires each of them to continue to retain legal counsel. It may permit them, however, without undue financial pressure on either party, to negotiate a fair buyout of the corporation or a party's stock ownership.

Second, plaintiff's stock will be tied to the individual defendants' stock for purposes of future stock purchases. The individual defendants are prohibited from entering into any agreement for the sale of all or part of their stock ownership interests unless plaintiff shall be extended the offer to participate in such sale on a pro rata basis, upon the same price-per-share and terms.

Finally, the defendant corporation shall, in the event of the plaintiff's death while owning any shares of the capital stock of the corporation, have an obligation to purchase the plaintiff's capital stock for the price and under the terms stated in paragraphs 2, 5, 6, 7, 8, 9, and 10 of the Stock Purchase Agreement dated December 6, 2005.

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B. Enforcement of Covenant Not to Compete

Contracts in restraint of trade or commerce are generally unlawful. "A contract ... between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MCL 445.772. However, there are specific exceptions to this rule. "It is the public policy of Michigan as embodied by statute to enforce reasonable non-competition provisions in employment contracts." *Leach v Ford Motor, Co.,* 299 F Supp 2d 763 (ED Mich, 2004), at 776. The Michigan Antitrust Reform Act ("MARA"), MCL 445.771 *et seq*., permits an employer to protect its "reasonable competitive business interests," stating:

> "An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited." MCL 445.774a(1).

A non-compete agreement protects the employer's reasonable competitive business interests if it protects "against the employee's gaining some unfair advantage in competition with the employer, but [does] not prohibit the employee from using general knowledge or skill." *St. Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006). The employer's reasonable competitive interests include protecting "close contact with the employer's customers or customer lists, or cost factors or pricing." *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 547 (6th Cir., 2007) (quotation marks omitted). It is proper for a court to issue a permanent injunction prohibiting a former employee from continued employment with a new employer for the duration of the non-compete agreement if the court determines that the non-compete agreement is enforceable, the former employee has breached the non-compete agreement, and injunctive relief is warranted. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 849 (ED Mich, 1994).

The court may enforce the terms of the parties' agreement to the extent that its duration, geographical area, and the type of employment or line of business affected are reasonable. The reasonableness of a noncompetition provision is a question of law when the relevant facts are undisputed. *Coates v Bastian Brothers, Inc*, 276 Mich App 498; 741 NW2d 539 (2007). A review of some recent decisions from the Court of Appeals assists the court in this analysis.

In *Coates,* the Court of Appeals upheld a jury verdict enforcing a noncompetition agreement contained in an employment contract. The plaintiff in *Coates* had worked for the defendant graphic communications and advertising firm for many years, rising to become general manager, and the employment contract also contained stock purchase agreements, as in

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the present case. The non-compete agreement in *Coates* was for a term of one year, and prohibited competition within a 100-mile radius of the defendant company. The Court of Appeals upheld the term, area, and scope of the non-compete agreement without much analysis of the type or line of business involved, other than to note "the undisputed length of plaintiff's employment" with the defendant company (22 years, as in the present case), and concluded that the trial court should have upheld the terms of the noncompetition agreement "as a matter of law." *Id.* at 508.

In *Pitsch Holding Co., Inc. v. Pitsch Enterprises, Inc.*, unpublished per curiam opinion of the Court of Appeals (Docket No. 315800, Aug. 7, 2014), the Court held that a five-year term in a noncompetition agreement between shareholders in a family-owned company, which commenced upon the selling of such shares, was not unreasonable, and affirmed a jury verdict which awarded damages for breach of the agreement. Similarly, in *Brown Dairy Equipment, Inc. v Lesoski*, unpublished per curiam opinion of the Court of Appeals (Docket No. 291372, Nov. 9, 2010), the Court affirmed the issuance of injunctive relief for breach of a noncompetition agreement and held the five-year term of that agreement, and the injunction, to be reasonable against a salesman of dairy farm supplies who had gone to work for a direct competitor in violation of that agreement.[7]

In *Grigg Box Co. v Michigan Box Co.*, unpublished per curiam opinion of the Court of Appeals (Docket No. 285862, Oct. 22, 2009), the Court of Appeals upheld injunctive relief in a case where the trial court had limited the scope and duration of a three-year noncompetition agreement to 18 months, and limited the scope of the agreement to a ban on sales to the former employer's customers.

In *St. Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006), the Court of Appeals noted that "Because the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition. To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill" (citation omitted). The Court concluded that the prohibition on a doctor from competing for one year and within seven miles of his former clinic locations was reasonable (the Court noted that the defendant had disputed the reasonableness of the geographical area, but not the duration of the agreement). *Id.* at 269.

[7] The Court of Appeals has also upheld injunctive relief in cases where the trial court has limited the scope and duration of a noncompetition agreement in order to find it reasonable. See, for example, *Grigg Box Co. v Michigan Box Co.*, unpublished opinion of the Court of Appeals (Docket No. 285862, Oct. 22, 2009) (three-year term of agreement limited to 18 months, and scope of agreement limited to a ban on sales to former employer's customers).

In *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), the Court of Appeals upheld a noncompetition agreement which prohibited the defendant's former employees from offering specific tax and accounting services to the defendant's clients for a period of two years. The Court held, without analysis, that the duration of the prohibition was reasonable. It concluded that the scope of the prohibition was also reasonable as it applied only to the firm's clients, and not to other persons or businesses, or to other kinds of accounting services. Finally, the court noted that the absence of any limit on the geographical area of the prohibition was not fatal to its enforceability, as a reasonable limit can be determined by the court under MARA. MCL 445.774a(1). *Id.* at 158-159.

In *Edwards Publications, Inc. v Kasdorf*, unpublished per curiam opinion of the Court of Appeals (Docket No. 281499, Jan. 20, 2009), the Court of Appeals reversed and remanded a trial court's dismissal of a claim alleging breach of a noncompetition agreement, where the plaintiff and plaintiff's former employee's new employer were clearly in competition. The court did not discuss the geographic area or duration of the agreement, but focused on the plaintiff's reasonable competitive business interests, stating:

> "Over a 13–year period, Kasdorf developed and nurtured close and personal relationships with numerous business customers while working for Edwards, learning much about their operations, tendencies, and leanings. The businesses reached a comfort level with Kasdorf that might not be reached, or might take awhile to reach, with another sales rep. By going to work for Bilbey, where Kasdorf's accounts would be with many of those same customers or where those customers would be subject to not-so-cold cold calls, Kasdorf would be gaining and taking an unfair advantage in competition with Edwards after years of acquiring a unique insight into various business operations thanks to her employment with Edwards. The development and cultivation of close relationships with people is undeniably a driving force in the sales profession and generates revenue; the more reliable, liked, and accountable the rep, the more income that is generated. And Kasdorf's relationship with each contact person at a particular business most certainly is unique. While Kasdorf may have acquired general knowledge, skill, or facility in relation to the mechanical functioning of sales, e.g., how to generally approach a customer, sell ad space, take ad requests and materials, and finalize an ad for publication, she also developed goodwill and strong personal relationships that are invariably different from person to person or business to business and cannot be labeled as generally acquired knowledge." *Id.*, slip op., p. 2.

The Court in *Edwards Publications* concluded that an employee who establishes direct customer contacts and relationships as the result of the goodwill of his or her employer's business is in a position to unfairly appropriate that goodwill and thus unfairly compete with the former employer upon departure. See *St. Clair Medical, supra*, at 266. Similarly, the Court of Appeals upheld the enforceability of a one-year, five-mile noncompetition agreement against a hairstylist brought by her former salon in *Lockworks, Ltd. v Keegan*, unpublished per curiam opinion of the Court of Appeals (Docket No. 279894, Jan. 27, 2009). The Court reversed the trial court's decision to reform the parties' agreement to permit her to compete at a salon located only 4.16 miles from the plaintiff's salon, concluding that the former employee would gain an unfair advantage over her former employer if permitted to provide services within the five mile radius stated in the contract.

Finally, in *Huron Technology Corp. v Sparling*, unpublished per curiam opinion of the Court of Appeals (Docket No. 316133, Sept. 11, 2014), the Court of Appeals upheld the denial of injunctive relief to the plaintiff, a maker of conveyor systems for the material handling industry, against its former sales engineer. The trial court denied relief on the basis that the defendant's new employer was not in competition with the plaintiff. Though both companies manufactured conveyors, they worked at opposite ends of the market, with one producing "standard equipment" and the other producing specialized and custom equipment. The Court's opinion provided an interesting analysis of the contract language, but ultimately concluded that the trial court's findings were not clearly erroneous.

Analysis

In the present case, the plaintiff began work for the defendant in 1992 as a master electrician, then became an estimator and project manager for the company before becoming the general manager of the company in 2002. Defendant Bing testified that plaintiff was in charge of the electrical side of the business, and that someone else ran the telecommunications side of the business. Plaintiff testified that Randy Westrate ran the controls department, Tom Kubiak ran the telecommunication department, and he ran the electrical department, until he became general manager and oversaw all three departments.

Plaintiff testified that from 2005 until he left T&C he had little external interaction with customers ("occasionally") and focused on internal interactions with staff, as he was "largely doing the internal operations side" of the company. (Exhibit 2, p. 12, 15). Plaintiff was terminated at T&C on January 7, 2014, and he now works for Windemuller Electric as the manager of their automation department, one of five divisions in the company (which also include an electrical division, a communications & IT division, an outdoor utilities division, and renewable energy division) (Exhibit 2, p. 91; Exhibit 7).

T&C has had recent gross revenues ranging from \$6.5 million to \$9.5 million per year. Windemuller Electric is a substantially larger company, though there is much overlap in the services they each provide. According to the company websites maintained by each company (relevant printouts of which were admitted into evidence as defendant's Exhibits 7 and 8, respectively), both companies began as commercial electrical contractors, providing commercial,

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industrial, institutional, and residential electrical design, engineering and construction services. Both have added telecommunications, automation, and controls services and products. They both offer Panasonic business phone systems, among others. Both companies tout their automation programming capabilities, with emphasis on PLC (programmable logic controls) programming. Plaintiff testified that T&C does not do SCADA programming, although Windemuller does. The parties dispute the extent of overlap between the companies' services.

At the time this litigation began, both companies were preparing to bid for a large project to be undertaken by Davenport University. Mr. Bing testified that both companies were represented at a pre-bid meeting, and that plaintiff was present as well. He said that plaintiff had previously attended Davenport University events as a representative of the defendant corporation, and that Windemuller had not previously sought Davenport University business before employing plaintiff. There is therefore some dispute between the parties as to the extent to which plaintiff had direct customer contacts in his final years at T&C, but no dispute that plaintiff had detailed knowledge of the operations, practices, pricing, and customers of the company, obtained over his last twelve years as its general manager.

The noncompetition agreement between the parties specifically prohibits plaintiff, for a period of two years, from being employed by or providing services to any company which is competing with or attempting to compete with the defendant corporation within the four-county geographic area identified in the agreement. This prohibition therefore applies to any competing company, similar to the prohibition in the *Coates* case, above. It does not prohibit competition as to every product or service offered by a competing company, as in *Huron Technology,* above. However, the overlap in products and services offered by plaintiff's employer and by the defendant are not complete or identical. Windemuller offers a broader range of services, in more fields of service, than does T&C. According to the testimony and evidence, although they compete in all areas of electrical contracting, they do not compete in all areas of automation. For example, T&C does not compete against Windemuller in SCADA programming. T&C also does not compete against Windemuller in the field of outdoor utilities and renewable energy. A complete prohibition on plaintiff's employment by Windemuller is thus broader than necessary to protect T&C's reasonable competitive business interests, and also prohibits the plaintiff from using his general knowledge and skill acquired over the past twenty-two years.

The court determines that protection of the defendant's reasonable competitive business interests justify a prohibition on plaintiff's contact with the defendant's customers, as in *Rooyaker*, 276 Mich App at 158-159, for the reasons noted in *Grigg Box,* and *Edwards Publications*, above. Those competitive interests also justify a ban on plaintiff competing with defendant in its primary service area, consisting of Ottawa and Kent counties in the State of Michigan. The Agreement between the parties had broadly defined the geographical scope of the noncompetition agreement, and then excluded from that scope "any county" from which

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T&C "derives less than five percent (5%) of its gross revenues...." DeYoung testified that 80% of T&C's business was in Ottawa County, and 18% in Kent County, and these facts were not disputed.

T&C's senior estimator, Mark Beekman, testified at trial that there had been a "handful of bids" on which T&C have competed directly against each other, though none involving DeYoung. DeYoung testified that he has not competed against T&C since joining Windemuller, and that he works in a completely different market as an automation manager. Most of his time working for Windemuller has been devoted to projects located in Sault Ste. Marie, Midland, and Traverse City, Michigan, and none for any current or former customers of T&C.

Bing confirmed that DeYoung has not engaged in any misappropriation, any improper solicitation, nor has he caused T&C any financial loss since the termination of his employment. Based upon the absence of any allegation of improper competition or solicitation by DeYoung, and the court's limitation of the scope of the noncompetition agreement, the court finds no facts to justify an extension of the non-compete and non-solicitation agreement, which expired by its own terms on January 7, 2016.

III. Conclusion

For the reasons stated above, the court finds and concludes as follows:

1. Defendant's termination of plaintiff's employment in and of itself was not an act of shareholder oppression, but was within the defendants' rights based upon the employment-at-will relationship between the parties.

2. Plaintiff's employment by Windemuller violated the noncompetition agreement between the parties as written, but does not violate the scope of the obligation as determined reasonable by the court and as so limited pursuant to MCL 445.774a(1). The term of that agreement expired on January 7, 2016, and there is no evidence that the agreement, as limited by the court, was violated by the plaintiff. The preliminary injunction previously entered by the court is vacated.

3. The defendants were under no contractual obligation to repurchase plaintiff's stock following the termination of plaintiff's employment based upon the prior agreement to terminate the Stock Purchase Agreement.

4. Defendant's failure to pay corporate dividends to the plaintiff in 2014, under the specific circumstances presented in this case, constituted an act of minority shareholder oppression.

5. The defendant corporation shall distribute not less than twenty-five percent (25%) of its annual reasonable pre-tax net income in the form of cash dividends to shareholders for so

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long as plaintiff is a shareholder in the corporation, commencing with calendar year 2014,[8] and continuing thereafter.[9]

6. Plaintiff's stock will be tied to the individual defendants' stock for purposes of future stock sales. The individual defendants are prohibited from entering into any agreement for the sale of all or part of their stock ownership interests unless plaintiff shall be extended the offer to participate in such sale on a pro rata basis, upon the same price-per-share and terms.

7. The defendant corporation shall, in the event of the plaintiff's death while owning any shares of the capital stock of the corporation, have an obligation to purchase the plaintiff's capital stock for the price and under the terms stated in paragraphs 2, 5, 6, 7, 8, 9, and 10 of the Stock Purchase Agreement dated December 6, 2005.

8. The court retains jurisdiction to enforce the terms of this Order. Plaintiff's remaining claims are dismissed. Defendants' counter-claims are dismissed. This is a final judgment and resolves all pending claims.

IT IS SO ORDERED.

Dated: April 25, 2016

Hon. Jon A. VanAllsburg, ~~Circuit Judge~~

[8] The calculation of the 2014 and 2015 dividends shall be based upon the corporation's actual taxable net income for such years (subject to the "reasonableness review" described in this Opinion), and shall be paid in 2016 (i.e., the court does not expect any amendment of 2014 or 2015 tax returns).

[9] This Order necessarily entitles plaintiff to review corporate and financial records of the defendant corporation, including 1) annual tax returns, 2) a list of bonuses, distributions, or dividends paid to shareholders and key employees, 3) a copy of the Independent Accountant's Review Report with complete financial statements, 4) any footnotes to financial statements, and 5) an itemization of all amounts greater than $5,000 in any "Other Expense" category on financial statements or tax returns. Such information shall be provided to plaintiff not less than annually, upon written request, for the purpose of determining the corporation's compliance with the requirements of this Opinion and Order. Plaintiff shall not share such information with any third party other than his personal attorney, accountant, and/or tax advisor, nor shall he use such information for any purpose other than as permitted by this Opinion and Order and as is reasonably related to his interests as a shareholder. A Protective Order may entered to verify and enforce such restricted use.